# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

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DAKOTA CENTRAL TELEPHONE COMPANY, a corporation, Northwestern Telephone Exchange Company, a corporation, Nebraska Telephone Company, a corporation, and South Dakota State Telephone Company, a corporation, Plaintiffs in error,

*v.*

STATE OF SOUTH DAKOTA, EX REL. BYRON S. Payne, as Attorney General, and John J. Murphy and P. W. Dougherty, as and constituting the Board of Railroad Commissioners of the State of South Dakota.

No. 967.

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*IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.*

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**MOTION ON BEHALF OF THE UNITED STATES AND PLAINTIFFS IN ERROR TO ADVANCE.**

Comes now the Solicitor General on behalf of the United States, and, because of the interest of the United States in said cause and with the concurrence of counsel for plaintiffs in error, who join in this

motion, moves the advancement of the above-entitled cause for hearing during the present term.

While the Postmaster General is not a formal party to the record, the question is made that he is an indispensable party, that the plaintiffs in error are really his agents, that the suit is one in effect against the United States, and that the United States is the party really affected by the decision.

The case presents the question whether the schedule of telephone rates, effective January 21, 1919, promulgated by the Postmaster General under the authority of the joint resolution of Congress of July 16, 1918, and the President's proclamation thereunder dated July 22, 1918, is legally applicable to intrastate service within the State of South Dakota. Defendants in error contended in their original bill filed in the Supreme Court of South Dakota that such rates were not lawful without the approval of the State Board of Railroad Commissioners, and that no such approval had been given. That court has granted a permanent injunction restraining the putting of said rates into effect, and the Postmaster General is being deprived of the revenues sought to be raised thereby, which are needed in operating said telephone lines. If such revenues are not collected as due, it is practically impossible to collect a large percentage afterwards.

The question presented in this case has arisen in suits filed in a number of other States, with the result that in Florida, Indiana, Illinois, Minnesota, Missouri, Nebraska, Ohio, Pennsylvania, and Michi-

gan the decision has been against the power claimed by the Postmaster General, while in the Federal courts of Florida, Indiana, New Jersey, and North Dakota, and in the State courts in Alabama, Louisiana, Massachusetts, and Oklahoma decisions have been rendered in his favor. Injunction proceedings are pending in Georgia, California, New York, Texas, Nebraska, Indiana, Wisconsin, North Dakota, and Mississippi.

Movant shows that this situation not only is producing financial loss, but is greatly embarrassing the administration of said telephone lines by the Postmaster General, and its speedy hearing is of great public moment.

Notice of this motion has been given to counsel for the defendants in error, who do not oppose the same.

ALEX. C. KING,
*Solicitor General.*

APRIL, 1919.

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*Plaintiffs in Error,*

*vs.*

STATE OF SOUTH DAKOTA, EX REL. BYRON S. PAYNE, Attorney General, ET AL.,
*Defendant in Error.*

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## Brief of Protective Telephone Association of Baltimore City, Maryland, et al. as Amici Curiae.

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The Protective Telephone Association of Baltimore City, Maryland, and Alfred R. L. Dohme and Herbert Sheridan, its President and Secretary, after leave first had and obtained, file herein this brief as *amici curiae* in support of the defendant in error.

### THE PROTECTIVE TELEPHONE ASSOCIATION.

The Protective Telephone Association of Baltimore City, Maryland, is a voluntary association, composed of seven hundred or more users of and subscribers to the telephone service

which is furnished by the Chesapeake and Potomac Telephone Company of Baltimore City. With the support of the business community, the Association was formed in 1912 for the purpose of obtaining reasonable telephone rates and service for Baltimore. At its instance, an investigation was commenced by the Public Service Commission of Maryland for the purpose of revising the existing telephone rates. In this investigation, all the property of the Telephone Company in the State of Maryland was valued for rate making purposes, and at the time of the breaking out of the war, there remained, only the segregation of Baltimore from the rest of the State, and the final fixing of rates upon the basis of the valuation already found by the Commission. After the war commenced both the Telephone Company and this Association asked that further action in the investigation be postponed, and the Public Service Commission of Maryland on December 6, 1917, passed the following order (No. 3986) postponing, on account of war conditions, any general readjustment of telephone rates in Maryland:

BEFORE THE

PUBLIC SERVICE COMMISSION OF MARYLAND.

CASE NO. 690.

IN THE MATTER OF

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY, INVESTIGATION OF RATES, CHARGES, PROPERTY AND AFFAIRS.

The application of the respondent company for a postponement of proposed hearings in the above matter for the purpose of ascertaining what, if any, readjustment of its rates,

charges and practices should be made, having been duly received, and this Commission, by its order No. 3949 of November 20, 1917, having directed that such application be set for public hearing on December 5, 1917, and that copies of said Order be sent to all the newspapers published in the State of Maryland with the request of the Commission that proper publicity be given of the objects and date of such hearing; and it appearing that copies of said order together with copies of the application of the respondent for such postponement and of the report of People's Counsel thereon, were in fact sent to all the newspapers published in the State with the request aforesaid, as well as to the proper officers and representatives of the Protective Telephone Association of Baltimore City; and it further appearing that much publicity was given to such order through the public press;

And Whereas, At the public hearing held on December 5th, 1917, pursuant to said Order No. 3949, representatives of the respondent company and of said Protective Telephone Association of Baltimore City and certain civic associations were present, together with other individual members of the general public, and were duly heard;

And Whereas, It was shown conclusively at such hearing both by evidence adduced by the respondent company and by the concurrence of those present at such hearing that owing to the World War now in progress and to abnormal conditions resulting therefrom, the present is not a propitious or suitable time for this Commission to determine what, if any, general readjustment of the rates, charges and practices of the respondent company in the State of Maryland should be made;

It Is Thereupon, This 6th day of December, 1917, by the Public Service Commission of Maryland,

Ordered, That hearings upon any proposed general readjustment of the rates, charges and practices of the Chesapeake and Potomac Telephone Company of Baltimore City, be postponed until such time as in the judgment of this Commission business conditions affecting said Company and the people of the State of Maryland are so stabilized or adjusted as to justify the further prosecution of such inquiry, or, in the alternative, until it shall be made to appear that the public convenience and necessity for such general readjustment reasonably demand the further prosecution of such inquiry despite the unsettled conditions resulting from the World War now in progress, and until the further order of this Commission in the premises so deciding; provided, however, that nothing contained in this order shall be taken as in any way precluding this Commission from inquiring into and passing upon specific complaints, made heretofore or hereafter from time to time of its own motion or by the respondent company or members of the general public, of individual or particular rates, charges or practices, on the ground that they are discriminatory or otherwise unreasonable or unjust, so long as such specific complaints do not involve an inquiry into the general readjustment of the rates, charges and practices of the respondent company, and may properly and reasonably be passed upon under conditions existing at the time such complaint or complaints may come to be heard;

And It Is Further Ordered, That copies of this order be transmitted by the Secretary to the respondent company and to the proper representatives of the Protective Telephone Association of Baltimore City, and that due publicity be given the same.

## Government Disregards Public Service Commission's Order.

The Chesapeake and Potomac Telephone Company, acting under the alleged authority of the Postmaster General of the United States, delegated to him by the President under virtue of the resolution of Congress of July 16, 1918, has from time to time disregarded the above mentioned order of the Public Service Commission of Maryland.

As instances of such disregard, the company promulgated new rates for telephone installations and removals effective September 1, 1918 (P. M. G. Order No. 1931), and, on January 21, 1919, revised intrastate toll charges (P. M. G. Order No. 2495). On account of the relative unimportance of these changes to the members of the Protective Telephone Association, it was considered unnecessary to contest their legality. When, however, on April 15, 1919, the Chesapeake and Potomac Telephone Company published advertisements in all the daily papers of Baltimore stating that an entirely new local rate schedule would be put into effect on May 1, 1919, it became evident that the question of the legality of rate changes made without the authority of the Public Service Commission of Maryland could no longer be avoided.

## General Counsel Rules That Commission is Powerless.

On April 19, 1919, the Protective Telephone Association, through its President, offered to the Public Service Commission of Maryland, the services of the Association and its counsel in upholding the authority of the Commission over intrastate telephone rates. On April 22nd the General Counsel of the Commission advised the Commission that it was without jurisdiction in the matter, and that the Government had absolute power to fix rates, irrespective of any action

which might be taken by the Commission, *which rates would continue in full force and effect even after the termination of Federal control.*

As the opinion of the General Counsel that it had no jurisdiction, inevitably barred the Public Service Commission of Maryland from affirmative action, the duty devolved upon the Protective Telephone Association of protecting the proper interests of telephone subscribers in Baltimore City. To secure such protection, it could have filed a bill for injunction against the proposed rates, of the same character as the bills for injunction which have been filed and granted in other states. On the other hand, it could postpone asking for such injunction in the reasonable expectation that it would be permitted to set forth arguments supporting its convictions in the instant case. This latter view seemed best, since final determination on any injunction proceeding holding up rates, must depend upon the decision of this Court in this case. For this reason the Association has determined that the interests of telephone subscribers in Maryland can best be protected through the filing of a brief in their behalf, and has therefore asked leave to present the following argument:

## ARGUMENT.

### Wire Control Resolution of July 16, 1918, was Expressly Limited.

The joint resolution of Congress adopted July 16, 1918, authorized and empowered the President during the continuance of the present war to take possession and assume control of any * * * telephone * * * system, and to operate the same in such manner as may be needful or desirable for the term of the war. *Unless the passage of this Act carried*

*with it the right to control intrastate telephone rates, then such right is non-existent in the President.*

At the close of this resolution of July 16, 1918, a distinct limitation is placed upon the control of the Government in the following words:

> "Provided further, That nothing in this Act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation *or the lawful police regulations of the several States,* except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." (The italics are ours.)

## What Did Congress Mean by the Words "The Lawful Police Regulations of the Several States"?

The main question at issue hinges upon the meaning of the words "lawful police regulations of the several States" which were specifically exempted from Government interference, except in regard to the transmission of Government communications and the issue of stocks and bonds. Unless Congress by the use of the words "police regulations" clearly and unequivocally confined this exemption to *penal* regulations, it must have meant to exempt the general police power over rates which is inherently possessed by each State through the nature of its sovereignty, for the Government has no authority over intrastate rates.

This power has been recognized by this Court in many cases, one of the earliest describing it in these words:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he

might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe vs. R. R. Co., 27 Vt. 143), but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Chief Justice Taney in the License Cases, 5 How. 583: 'Are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for service rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

Munn vs. People of Illinois, 94 U. S. 113.

## The Police Regulations of the Several States are Nothing More or Less Than the Police Power of the Several States Translated Into Terms of Action.

To confine the meaning of the words "police regulations" to certain unimportant penal statutes is a narrow and technical distortion. The right of the State to regulate rates rests as this Court has said, upon its police *power* to protect the life, health, comfort and property of all persons within the State, and whenever this right is translated into action, this action necessarily takes the form of a police *regulation*. The State controls intrastate rates *under its police power by means of police regulations*. To assert that Congress intended to take away the police power of the states over intrastate rates, yet also specifically left all the State police regulations in full force and effect, is tantamount to an assertion that Congress intended to establish irrevocably all the then existing intrastate rates for the duration of the war. *For if the police power of the State were taken away, there would be no other power by which existing police regulations, under which the rate schedules had been established and were being continued, could be altered.*

This Court itself has spoken of state police regulations as including the actual fixing by the state of intrastate rates.

> "Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislation of the State, passed in 1873, in respect to it, we are of the opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of *taxation, rates and other police regulations.*" (The italics are ours.)
>
> Reagan vs. Mercantile Trust Co., 154 U. S. 413, 417.

A clear statement of the entire question is contained in a very recent decision of the New Jersey Board of Public Utility Commissioners when it said:

> "Lawful police regulations of the states are such regulations as the states may lawfully make in the exercise of their police power. The courts in numerous decisions have held that the regulation of rates is a lawful exercise of the police power. It is not pertinent, and, therefore, unnecessary, to discuss whether Congress, in providing for Federal operation of telephone companies, had power to declare state laws affecting these companies to be null and void. The fact is that Congress expressly declared that its act should not be construed to impair or repeal such laws in relation to lawful police regulations. Unless and until it is declared by a Court of competent jurisdiction that the suspension of increased charges for telephone service is not a lawful police regulation, the Board must assume the Postmaster General, as well as the telephone companies operated by him, are subject to provisions of the New Jersey statute with respect to charges for such service."
>
> *Re* Suspension of Increased Charges for Telephone Service, P. U. R. 1919, B. 587.

### Light Thrown on Subject by Rail Control Act.

When Congress passed the Federal Rail Control Act of March 21st, 1918, it expressly provided (paragraph 10) that the President might initiate rates, fares, charges, etc.; the reasonableness of the same being left to the final determination of the Interstate Commerce Commission. When, however, the Government took over the telephone lines under authority of the resolution of July 16, 1918, Congress failed to place any regulatory body in charge of interstate telephone rates. *It is a matter of common knowledge that telephone*

*rates relate chiefly to local and not interstate service, the reverse being true in regard to railway rates.*

The Rail Control Act contained the same exemption of lawful police regulations of the states found in the Wire Control Resolution. This, we submit, meant to leave to State Commissions their former control of intrastate rates, and as to interstate rates gave to the President the initiative. But the President, as we have shown, could not fix the rates finally without the approval of the Interstate Commerce Commission.

*Why should the Postmaster-General, the agent of the President, assume a power over wires which Congress carefully refrained from giving the President over rails?*

Even under the assumption, which we consider erroneous, that Government rail control was extended over *intrastate rates*, we cannot bring ourselves to believe that Congress intended to and did afford to shippers a tribunal to which they could appeal for the adjustment of intrastate railroad rates, and later deprived telephone subscribers, whose chief interest lay in intrastate rates, not only of the opportunity of an appeal to their own Public Service Commissions, but even of any appeal at all. The language used gives no substantial reason for believing that Congress so intended. Not only is the *wording* of the exemption contained in the Act directly to the contrary, as we have shown, but the fundamental interpretation of the Act by any rule of reason would negative such a presumption.

## If Doubt Exists, Decision Should Favor State Control.

If there exists doubt on the subject, such doubt should be resolved in favor of State control. All powers which have not been delegated to the Federal Government are reserved, under the Constitution, to the several States. The exercise

of State power over intrastate rates is based solely on its reserved powers under the Constitution. Such powers cannot be taken away by Congress except by the expression of a clear and direct intention.

> "The principle has been often reaffirmed that 'in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together.'"
>
> Reid vs. Colorado, 187 U. S. 137, 148.

The most that can be said in favor of the Government's position still leaves the intention of Congress a question of doubt. In the event of such doubt, the rule of this Court leads to the conclusion that the reserved powers of the several States over intrastate rate matters have *not* been summarily taken away.

## CONCLUSION.

Waiving discussion, for the purpose of brevity, of such related issues as the validity of the resolution itself, the delegation of the authority vested in the President, the cessation of hostilities six months ago, and subjects of a similar nature, we are content to rest the case wholly upon the construction of the Act of Congress of July 16, 1918. We contend that the fixing of intrastate rates is now and always has been a lawful exercise of police regulations based upon the powers reserved to the States under the constitution; that these powers cannot be taken away from the States even in time of war except by an Act of Congress clear, and unequivocal in meaning; and that the Act of July 16, 1918, not only does not take away State power to fix rates, but on the contrary expressly leaves it in full force and effect.

For these reasons we ask the Court to hold that the Government has no jurisdiction over intrastate telephone rates, and that such rates cannot be increased without submission to the Commissioners of the several States having authority in time of peace.

H. FINDLAY FRENCH,
OGLE MARBURY,
*Solicitors and Counsel.*